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FEDERAL JURY IMPROVEMENTS ACT OF 1982

DECEMBER 8 (legislative day, NOVEMBER 30), 1982.—Ordered to be printed

Mr. THURMOND, from the Committee on the Judiciary,
submitted the following

REPORT

[To accompany S. 2863]

The Committee on the Judiciary to whom was referred the bill (S. 2863) to extend to all Federal jurors eligibility for Federal workers' compensation, to provide for the taxing of attorney fees in certain actions brought by jurors, and to authorize the service of jury summonses by ordinary mail, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

This bill relating to jurors' rights and the administration of the Federal jury system contains three distinct provisions. The first section provides for the awarding of attorney fees for government funded attorneys as well as privately retained attorneys when jurors are successful litigants against their employers. Under current law,¹ jurors may bring legal action against employers inhibiting or interfering with their jury service and may collect attorney fees if the court finds in their favor. However, when the juror is represented by appointed counsel, the law does not require that the government be reimbursed.

The second section of S. 2863 extends to the courts the option of using regular first class mail for the delivery of jury summonses along with the current methods of personal service and registered or certified mail. In a survey of clerks to the United States District Courts, the Office of Administrative Courts found overwhelming support for this provision which it estimates will drastically reduce mailing costs, lessen the clerical burden, and improve the delivery rate of jury summonses.²

¹ 28 U.S.C. 1987.

² Letter from William R. Burchill, Jr., Deputy General Counsel, Administrative Office of the United States Courts, to Senate Judiciary Subcommittee on Agency Administration, September 9, 1982. Survey of 8 of 11 Circuits reports \$316,492.40 savings.

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The third section of S. 2863 extends Federal Employee Compensation Act (FECA) coverage to all Federal jurors. Current law provides compensation to jurors for duty related mishaps only if they are also Federal employees.³ Specific exclusion of non-Federal employee jurors leaves these public servants without monetary recourse in the event of a duty-related injury, (see letter from Judge Miles Lord, Chief Judge for the District of Minnesota, to Senator Strom Thurmond, June 24, 1982).

Support for this extension of FECA benefits to jurors has been evident throughout the proposal's legislative history and was reaffirmed in the September 23, 1982, hearing. The primary question concerned whether traveling to and from the courthouse is considered within the juror's "preformance of duty" and therefore covered by FECA.

As set forth in S. 2863, travel to and from the courthouse, except when jurors are transported to a site by order of the court for taking a view, is not considered a duty related activity. This determination aligns with FECA case history which holds travel to and from a workplace to be outside the parameters of activity incident to employment and injuries occurring as a result of such travel are not compensable.⁴

The cost of this proposal is not easily estimated due to lack of statistics because juror FECA claims are not currently allowed. However, it appears that injuries are rare and claims would likely be small. The Administrative Office of United States Courts and the Congressional Budget Office estimate a yearly cost of less than \$100,000. That cost is more than offset by the savings to result in changing the delivery method of jury summonses.

BACKGROUND

The provisions of S. 2863 are adapted from legislation suggested by the Judicial Conference of the United States. Following is the text of a letter from the Judicial Conference to the Honorable George Bush, President of the Senate, outlining the basis for its recommendations:

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS,
Washington, D.C., May 20, 1981.

HON. GEORGE BUSH,
*President, U.S. Senate,
Washington, D.C.*

DEAR MR. PRESIDENT: On behalf of the Judicial Conference of the United States, I am transmitting for the consideration of the Congress a draft bill to improve the conditions of federal jury administration and service in three major respects: (1) by extending statutory compensation for work injuries to all persons rendering federal jury service; (2) by making a technical amendment to 28 U.S.C. § 1875(d) to clarify the payment and taxation of attorneys' fees expended on behalf of jurors who are the object of discharge, intimidation, or

³ Letter from Herbert A. Doyle, Jr., Director, Office of Workers' Compensation Programs, United States Department of Labor, to Carl Imlay, General Counsel, Administrative Office of the United States Courts, November 26, 1975. Clarifies that jurors are not considered "employees" under the Federal Employee Compensation Act.

⁴ *Bailey v. United States*, through Department of Army 451 F.2d 963 (1971).

coercion by employers arising from their jury services; and (3) by expanding the methods of serving jury summonses under 28 U.S.C. § 1866 to include regular first class mail, as well as personal services and registered or certified mail.

COMPENSATION FOR INJURY TO JURORS

The first section of this draft bill would provide Federal Employees' Compensation Act coverage under chapter 81 of title 5, United States Code, to all persons serving as jurors in the United States district courts and bankruptcy courts. Such coverage would thus become applicable not only to federal employees serving as federal jurors, as at present, but as well for all other persons performing jury duty in federal courts in fulfillment of basic obligations of citizenship.

Although coverage for federal employees who are serving as jurors was provided in the Act of September 7, 1974, Public Law No. 93-416, 88 Stat. 1143, adding 5 U.S.C. § 8101(1) (F), the extension of such benefits to private citizens who are injured while serving as federal jurors was not provided in that legislation. Nevertheless, the legislative history of this law in Senate Report No. 93-1081, 93rd Congress, 2d Sess., evidenced agreement at that time with a similar resolution of the Judicial Conference adopted in March, 1974 (*see* 1974 *U.S. Code Cong. and Admin. News* 5341, 5347) with respect to private citizens on federal jury duty.

Serious problems can arise when federal jurors who do not happen to be employed by the United States Government are injured or disabled while in the performance of jury service. On several occasions prior to and since the enactment of Public Law No. 93-416, the United States Department of Labor has rejected federal jurors' claims for injury compensation on the basis that jurors were not defined as "employees" of the federal government within the meaning of 5 U.S.C. § 8101(1). Since the enactment of Public Law No. 93-416, nothing has happened to indicate any change in this administrative interpretation relating to persons, not federally employed, who are serving as jurors in the courts of the United States. The purpose of this bill is to provide remedial legislation to specify that compensation benefits shall apply to *all* persons injured while serving as federal jurors.

Strong policy reasons exist for bringing all federal jurors within the coverage of the Federal Employees' Compensation Act. Jurors provide a valuable service to the government. While in actual service as a petit or grand juror, the citizen-juror should rationally be accorded the benefit of protection in case of a "job-related" mishap. What begins as the fulfillment of a high duty of citizenship through public service to the government could be turned into an economic catastrophe for the juror in the event of an accident or injury while serving. Presently a person injured while serving as a juror cannot recover compensation unless he can bring his case under the Federal Tort Claims Act by proving negligence on the part of the government or its agent, a difficult burden. Moreover, this inequity is compounded by the fact that a federal employee in the same circumstances would now be covered by these compensation acts. It would also contribute to the juror's peace of mind, especially in a protracted case or

in a situation where he must be transported to make a site inspection, to know that this benefit is available. This aspect of the proposal might be especially reassuring to the head of a family or to the timorous juror sitting in a sensational criminal trial. While jurors are not frequently injured, we do have a number of such instances on record.

Section one of the enclosed draft bill would add new section 8142a to chapter 81 of title 5. Proposed section 8142a(a) and (b) define the protected juror to be one who is in actual attendance at court and specify when payments can commence. Proposed section 8142a(c)(1) defines the rate of pay that a federal juror is deemed to be receiving for purposes of the compensation scheme provided in chapter 81. This subsection also takes into account the situation of the federal employee-juror and defines his compensation to be his normal, actual rate of pay while on court leave pursuant to 5 U.S.C. §§ 5537 and 6322. Section 8142a(c)(2) limits and defines when the juror is deemed to be in the performance of duty, ensuring that claims for compensation shall not be granted except for strictly duty-related mishaps. Federal jurors would not by virtue of this legislation become actual employees of the federal government. This amendment is not to be construed to characterize jurors as employees for any other purpose than their compensation for injuries resulting from jury service. Existing section 8116(c) of title 5 would make recovery under the Federal Employees Compensation Act the exclusive remedy of the juror against the United States for such injuries.

In view of the fact that the provisions of the Federal Employees Compensation Act presently extend via 5 U.S.C. § 8101(1)(B) to "an individual rendering personal service to the United States similar to the service of a civil officer or employee of the United States, without pay or for nominal pay," it appears appropriate as a matter of fairness to offer this same financial protection to persons summoned by the United States district courts and required to perform jury service as an obligation imposed upon them by the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861. Such a provision was passed by the United States Senate in the 95th Congress on April 27, 1978, as Title III of S. 2074, but this portion of the bill was not acted upon by the House of Representatives.

TAXATION OF JUROR ATTORNEY'S FEES

Section 2 of the draft bill which I am submitting would make a technical amendment to section 1875(d) of title 28, United States Code. Section 1875 was recently added to title 28 by the Jury System Improvements Act of 1978, § 6, Public Law No. 95-572, 92 Stat. 2456.

Section 6 of the Jury System Improvements Act of 1978, enacting 28 U.S.C. § 1875, was passed by the 95th Congress after having been strongly recommended by the Judicial Conference. Its purpose was to provide statutory assurance to federal jurors that they would not be dismissed from their employment as a result of being called for jury service and that they would be protected from harassment, intimidation, or other interference by their employers with their right to serve as jurors when called upon to do so.

It is now provided by 28 U.S.C. § 1875 that an employer who violates the basic duty imposed upon him by this section shall be subject

to legal action for damages, injunctive relief, and a civil penalty. The United States district courts are afforded original jurisdiction over civil actions brought for this purpose. Subsection (d) of section 1875 now provides that a juror claiming a violation of this section by his employer may apply to the district court for the appointment of an attorney to represent him in the redress of such a grievance and that the court, upon finding probable merit in such claim, shall appoint counsel for this purpose. Subsection (d)(2) further provides that, where the juror has retained his own attorney to pursue legal action against an employer instead of seeking court-appointed counsel, the court may award such an employee who ultimately prevails in the action a reasonable attorney's fee as part of the costs. This subsection in its present form fails to make provision for the taxing of attorney's fees against an employer in a situation where the juror's lawyer has been appointed by the court and compensated from government funds, as authorized by section 1875(d) to the extent provided by 18 U.S.C. § 3006A.

Subsequent to their enactment, the Judicial Conference Committee on the Operation of the Jury System had occasion to review these statutory provisions on juror employment protection in order to advise the United States district courts on problems likely to be encountered in their implementation. On the basis of this review, it is the position of the Judicial Conference that the courts should be authorized to tax juror attorney's fees against employers where the juror is proceeding by appointed counsel paid from government funds, as well as where the juror has retained an attorney at his own expense. The prospect of being taxed an attorney's fee as part of the costs under this section would be a strong deterrent against employer misconduct and violation of his employees' rights. Such a sanction should logically be available whether the juror has retained his own attorney or has been granted a court-appointed counsel. Nevertheless the prevailing view has been that the courts do not have discretion to tax attorney's fees as part of an award of costs except where there has been a specific legislative authorization to do so. *Alaska Pipeline Service Co. v. Wilderness Society et al.*, 421 U.S. 240 (1975).

Where an attorney's fees are being taxed against an employer in a situation in which the attorney has been compensated from government funds rather than being paid by the juror himself, this bill provides that such fees shall be taxed as costs payable to the court rather than to be awarded to the juror. This bill further makes a minor change in the numbering of the subsections in section 1875(d) by correctly designating the first paragraph thereof as subsection (d)(1). The number (1) was inadvertently omitted from this paragraph when the Jury System Improvements Act of 1978 was enacted.

SERVICE OF SUMMONS FOR JURY SERVICE

Section 3 of the draft bill being submitted would amend the second and fourth paragraphs of 28 U.S.C. § 1866(b) with respect to the manner of serving a summons upon prospective jurors, summoning them to court for jury service. This subsection presently requires that these jury summonses shall be served personally or by registered or certified mail. In practice, such summonses are now served nearly always by mail rather than by personal service.

The Judicial Conference Committee on the Operation of the Jury System has now recommended, and the Conference has agreed, that it would improve the efficiency of federal jury selection if section 1866 (b) were amended to provide added flexibility through permitting the service of such summonses by regular, first class mail as well as by the methods of service presently authorized.

In arriving at this recommendation the Jury Committee received a survey of clerks to United States district courts which indicated their substantial support for this amendment. Many of the clerks and others familiar with the day-to-day demands of jury administration believe that service of jury summonses by ordinary mail would reduce mailing costs, would lessen the clerical burden of readying such summonses for service, and would improve the delivery rate of jury summonses by avoiding the reluctance of some persons to accept and sign for a registered or certified letter.

In recommending this legislation to add regular mail as a means of serving federal jury summonses, the Judicial Conference is not necessarily urging that all district courts should adopt this practice. The draft bill preserves the discretion of the courts to continue to require service of such summonses personally or by registered or certified mail, as at present. Those courts which face a substantial problem in achieving voluntary compliance with the summons by prospective jurors will undoubtedly wish to adhere to the present practice in order to have proof of the summons' delivery in the event that its recipient must be ordered to show cause for failure to appear under 28 U.S.C. § 1866(g). Likewise, individual jurors who fail to respond to the initial summons could, under this bill, still be served personally or by registered mail with a follow-up summons as a prelude to any order to show cause for nonappearance.

Nevertheless it appears desirable to accord enhanced discretion to the district courts to select the manner of service of their jury summonses which appears most efficient in views of local practices and circumstances. The Judicial Conference accordingly recommends the enactment of section 3 of the enclosed draft bill.

It is the view of the Judicial Conference that the adoption of this bill is an important and needed step toward improving the efficiency of jury selection and the conditions of service imposed upon federal jurors. The Administrative Office of the U.S. Courts will be pleased to provide any further information necessary to the consideration of this draft bill, and representatives of the Judiciary and of this office will be available to testify before the committee to which the bill may be referred.

Sincerely,

WILLIAM E. FOLEY, *Director.*

Enclosure.

U.S. DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA,
Minneapolis, Minn., June 24, 1982.

Senator STROM THURMOND,
Senate Judiciary Committee, U.S. Senate,
Washington, D.C.

DEAR SENATOR THURMOND: I am writing to you to strongly urge that the coverage of the Federal Employee Compensation Act be expanded

to include those serving as Federal jurors. 5 U.S.C. § 1801. I was recently trying a case in Duluth and, on a trip to view the accident site, one of the jurors fell and was injured. In the coverage provisions of the F.E.C.A., such individuals are specifically excluded although coverage has been extended to include those jurors who are also regular federal employees.

Where civic-minded individuals contribute their time and effort to fulfill the important tasks of a Federal juror, losing valuable time from their usual work activities, I feel it imperative that they receive protection for possible injuries incurred during their service. I note in reviewing the legislative history of the Act that such coverage was expressly supported by the Senate Committee on Labor & Public Welfare (S.R. No. 93-1081, 1974). *See* Pub. L. No. 93-416, 1974, U.S. Code Cong. & Ad. News, 5347. Their recommendation reflects careful analysis of potential problems of non-coverage and should therefore be accorded due consideration by the Senate Judiciary Committee in its review of the Act.

Thank you.

Very truly yours,

MILES W. LORD,
U.S. District Court.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., October 29, 1982.

HON. STROM THURMOND,
Chairman, Committee on the Judiciary, U.S. Senate,
Dirksen Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 2863, a bill to amend Title 28 to provide protection to all jurors in federal cases to clarify the compensation of attorneys for jurors in protecting their employment rights, and authorizing the service of jury summonses by ordinary mail, as reported by the Subcommittee on Agency Administration of the Senate Committee on the Judiciary, September 29, 1982.

This bill would extend to all federal jurors eligibility for worker's compensation, would provide for the awarding of attorneys' fees in certain actions brought by jurors and would authorize the service of jury summonses by first class mail.

The major budget impact of this bill is the savings resulting from the use of first-class mail, rather than registered or certified mail, for notification of jury service. Based on information provided by the Administrative Office of the U.S. Courts, this provision is estimated to save between \$0.4 million and \$0.6 million per year. There will, on the other hand, be additional costs for worker's compensation for jury-related injuries; however, these costs are estimated to be less than \$0.1 million annually. Thus, enactment of S. 2863 is estimated to result in net savings of at least \$0.3 million to \$0.5 million per year.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

RAYMOND C. SCHEPPACH
(For Alice M. Rivlin, Director).

SECTION-BY-SECTION ANALYSIS

SECTION 1

This corrects a technical error made in the Jury System Improvement Act of 1978, Public Law 95-572, 92 Stat. 2456. Under current law, attorneys may be appointed to represent persons who have employment discrimination claims against employers who have discriminated against them on the basis of jury service. In addition, the current law provides that a successful plaintiff-juror may recover attorneys' fees if such person has retained counsel. This amendment permits the court to award attorneys' fees in cases involving appointed counsel. Because this amendment confers a procedural benefit, it applies to pending cases. The amendment is drawn to preclude double recovery. If the employer is found liable, then the attorneys' fees are awarded as costs to the court. Then, in turn, the court would compensate the attorney who had been appointed.

This amendment to section 1875(d) of title 28 has the net result of placing retained counsel and appointed counsel in parity with respect to the liability of defendants who have been found to have discriminated against employees because of jury duty.

SECTION 2

This section amends section 1866(b) of title 28 to provide that persons may be notified of jury service by registered, certified, or first class mail. Under current law, first class mail is not a permissible method of notification.

SECTION 3

This section adds a new section 1877 to title 28 and amends chapter 81 of title 5 to provide that persons who serve on Federal juries and who are not otherwise Federal employees are eligible to receive Federal Workers' Compensation if they are injured during the performance of jury duty.

Subsection (a) of this section provides that any compensation will not commence until the day after the injured person has stopped serving as a juror. Proposed subsection (b) provides: (1) that the level of possible compensation shall be at least equivalent to GS-2, but may be higher if the injured juror has an actual pay level that is higher; and (2) provides for a definition of when a person is serving as a juror and makes a technical amendment to the table of sections of this chapter.

SECTION 4

This section amends section 8101 of title 5 by striking out all after "juror" in subparagraph (F).

SUBCOMMITTEE ACTION

As of October 1, all subcommittee members had submitted their vote in favor of S. 2863.

REGULATORY IMPACT STATEMENT

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate it is hereby stated that the bill will have no additional direct regulatory impact. After due consideration, the Committee has determined that the changes in existing law contained in this bill will not increase or diminish any present regulatory responsibilities of the U.S. Department of Justice or any other Department which exercises a law enforcement responsibility.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law, made by the bill, S. 2863, as reported, are shown as follows (new material is printed in italic and existing law in which no change is proposed is shown in roman) :

TITLE 28, UNITED STATES CODE

* * * * *

CHAPTER 121—JURIES; TRIAL BY JURY

* * * * *

§ 1866. Selection and summoning of jury panels

(a) The jury commission, or in the absence thereof the clerk, shall maintain a qualified jury wheel and shall place in such wheel names of all persons drawn from the master jury wheel who are determined to be qualified as jurors and not exempt or excused pursuant to the district court plan. From time to time, the jury commission or the clerk shall publicly draw at random from the qualified jury wheel such number of names of persons as may be required for assignment to grand and petit jury panels. The jury commission or the clerk shall prepare a separate list of names of persons assigned to each grand and petit jury panel.

(b) When the court orders a grand or petit jury to be drawn, the clerk or jury commission or their duly designated deputies shall issue summonses for the required number of jurors.

Each person drawn for jury service may be served personally, or by registered [or certified], *certified*, or *first class* mail addressed to such person at his usual residence or business address.

If such service is made personally, the summons shall be delivered by the clerk or the jury commission or their duly designated deputies to the marshal who shall make such service.

[If such service is made by registered or certified mail, the summons may be served by the clerk or jury commission or their duly designated deputies who shall make affidavit of service and shall file with such affidavit the addressee's receipt for the registered or certified summons. If such service is made by the marshal, he shall attach to his return the addressee's receipt for the registered or certified mail.]

If such service is made by mail, the summons may be served by the marshal, clerk, or jury commission, or their duly designated deputies, who shall make affidavit of service and shall attach thereto any receipt from the addressee for a registered or certified summons.

§ 1875. Protection of jurors' employment

(a) * * *

(d) (1) An individual claiming that his employer has violated the provisions of this section may make application to the district court for the district in which such employer maintains a place of business and the court shall, upon finding probable merit in such claim, appoint counsel to represent such individual in any action in the district court necessary to the resolution of such claim. Such counsel shall be compensated and necessary expenses repaid to the extent provided by section 3006A of title 18, United States Code.

[(2) In any action or proceeding under this section, the court may award a prevailing employee who brings such action by retained counsel a reasonable attorney's fee as part of the costs. The court may award a prevailing employer a reasonable attorney's fee as part of the costs if the court determines that the action is frivolous, vexatious, or brought in bad faith.]

(2) *In any action or proceeding under this section, the court may award a prevailing employee who brings such action or proceeding by retained counsel a reasonable attorney's fee as part of the costs. The court may tax a defendant employer, as costs payable to the court, the attorney fees and expenses incurred on behalf of a prevailing employee, in any case in which such fees and expenses were paid pursuant to paragraph (1) of this subsection. The court may award a prevailing employer a reasonable attorney's fee as part of the costs only if the court finds that the action or proceeding is frivolous, vexatious, or brought in bad faith.*

"§ 1877. Protection of jurors

"(a) *Subject to the provisions of this section and title 5 of the United States Code, subchapter 1 of chapter 81, title 5, United States Code, applies to a Federal grand or petit juror, except that entitlement to disability compensation payments does not commence until the day after the date of termination of service as a juror.*

"(b) *In administering this section with respect to a juror covered by this section—*

"(1) *a juror is deemed to receive monthly pay at the minimum rate for grade GS-2 of the General Schedule unless his actual pay as a Government employee while serving on court leave is higher, in which case monthly pay is determined in accordance with section 8114 of title 5, United States Code, and*

"(2) *performance of duty as a juror includes that time when a juror is (A) in attendance at court pursuant to a summons, (B) in deliberation, (C) sequestered by order of a judge, or (D) at a site, by order of the court, for the taking of a view.";*
and

(2) *by amending the table of sections for such chapter by adding after the item relating to section 1876, the following:*
"1877. Protection of jurors."

TITLE 5, UNITED STATES CODE

* * * * *

Subchapter I—Generally

§ 8101. Definitions

For the purpose of this subchapter—

(1) "employee" means—

(A) a civil officer or employee in any branch of the Government of the United States, including an officer or employee of an instrumentality wholly owned by the United States;

(B) an individual rendering personal service to the United States similar to the service of a civil officer or employee of the United States, without pay or for nominal pay, when a statute authorizes the acceptance or use of the service, or authorizes payment of travel or other expenses of the individual;

(C) an individual, other than an independent contractor or an individual employed by an independent contractor, employed on the Menominee Indian Reservation in Wisconsin in operations conducted under a statute relating to tribal timber and logging operations on that reservation;

(D) an individual employed by the government of the District of Columbia; and

(E) an individual appointed to a position on the office staff of a former President under section 1(b) of the Act of August 25, 1958 (72 Stat. 838);

but does not include—

(i) a commissioned officer of the Regular Corps of the Public Health Service;

(ii) a commissioned officer of the Reserve Corps of the Public Health Service on active duty;

(iii) a commissioned officer of the Environmental Science Services Administration; or

(iv) a member of the Metropolitan Police or the Fire Department of the District of Columbia who is pensioned or pensionable under sections 521–535 of title 4, District of Columbia Code; and

(F) an individual selected pursuant to chapter 121 of title 28, United States Code, and serving as a petit or grand juror; [and who is otherwise an employee for the purposes of this subchapter as defined by paragraphs (A), (B), (C), (D), and (E) of this subsection.]